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No. 06-366

In The
Supreme Court of the United States

CESAR ARNOLDO VALDEZ and
HECTOR RAUL VALDEZ,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit's opinion in *United States v. Mares*, 402 F.3d 511 (5th Cir. 2005), which conflicts with the United States Supreme Court's opinion in *United States v. Booker*, 543 U.S. 220 (2005) and other federal circuits court of appeals, violates the Sixth Amendment by permitting judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Cesar Arnoldo Valdez and Hector Raul Valdez, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit issued its published opinion in this case on June 15, 2006. A copy of that opinion is attached as Appendix pages 1-27.[1] The opinion is available at *United States of America v. Cesar Arnoldo Valdez, Hector Raul Valdez*, 453 F.3d 252 (5th Cir. 2006). The judgment from the Fifth Circuit is attached as Appendix App. 28-29. The judgment of the district court is unreported, a copy of the judgment is attached as Appendix App. 30-46.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 2006. No petition for rehearing was entered in this case. Tnis petition is filed within 90 days after entry

[1] Citation to the Appendix to this writ is as follows: "App. __" refers to the Appendix with the page number following the colon. Citation to the record on appeal is as follows: "R" refers to the trial court's record and transcript of the proceedings with the volume number immediately after the "R" and the page number after the colon. "R.E." refers to the Record Excerpts filed with the direct appeal.

of the judgment. See SUP. CT. R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 52(b) provides:

A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

The Sixth Amendment to the United States Constitution provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

United States Sentencing Guidelines (USSG) U.S.S.G. § 2D1.1(c)(3) provides in relevant part:

Unlawful Trafficking (including Possession with Intent to Commit); Attempt or Conspiracy: if the controlled substance quality is at least 3,000 KG but less than 10,000 KG of marijuana, then its base offense level 34.

United States Sentencing Guidelines (USSG) U.S.S.G. § 3B1.1(a) provides in relevant part:

Aggravating Role: Based on the defendant's role in the offense, increase the offense level as follows: if the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

STATEMENT

The federal government investigated a drug trafficking conspiracy which took place between 2001 through 2002. This conspiracy involved multiple defendants and was staged from Del Rio, Texas through Dallas, Texas. (R1: 1-6). Two of the twelve people indicted from the investigation were Cesar Valdez and Hector Valdez. Cesar Valdez and Hector Valdez are brothers. Petitioners were indicted on charges related to a conspiracy to transport quantities of marijuana, as well as cocaine (cocaine only applied to Hector Valdez) under 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846. They were also indicted separately for violating 21 U.S.C. §§ 841(a)(1) and (b)(1) and 18 U.S.C. § 2. (R1: 1-6). A jury subsequently convicted Hector Valdez on one count of Conspiracy to Possess Marijuana With Intent to Distribute, 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846 and one count of Possession of Marijuana with Intent to Distribute – Aiding & Abetting, U.S.C. §§ 841(a)(1) and (b)(1)(C) and 18 U.S.C. § 2. (App. 30-31). The same jury convicted Cesar Valdez of Conspiracy to one Count of Possession of Marijuana With Intent to Distribute, 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846 and two Counts of Possession of Marijuana with Intent to Distribute – Aiding & Abetting, U.S.C. §§ 841(a)(1) and (b)(1)(B) and 18 U.S.C. § 2. (App. 38-39).

After reviewing pre-sentence investigation reports (PSR) for both Hector and Cesar, the court assigned base offense level 36 (U.S.S.G. § 2D1.1(a)(3)) to both brothers (R14: 6, 8-9). Both brothers' base offense level was increased by four points for their roles in the offense because the judge found each to be leaders or organizers in the conspiracy (U.S.S.G. § 3B1.1(a)). *Id.* This adjustment was

not found by the jury or even charged in the indictment. (R4: 212 & R2: 223).

The enhancements were based on testimony at trial and the judge's opinion that the self-proclaimed leader of the conspiracy, Pedro Ramirez, a codefendant who testified at trial, was too simple of a man to organize such a conspiracy. The court overruled both brothers' objections to the enhancements. R14: 6, 8-9. Further, the court overruled both brothers' objections to the drug quantity they were being sentenced under. *Id.* Hector Valdez was charged with one count of Conspiracy to Possess Cocaine, but was acquitted by the jury of that count. (RE: 4B). Further, Cesar Valdez was not charged with the Cocaine count. The PSR reflected and added 80 KG of cocaine to both brothers' drug quantity calculation. The PSR calculated Hector's drug quantity on the marijuana to be 2,307, but adding in the 80 KG of cocaine and converting that to marijuana his total responsibility was 18,370. The PSR calculated Cesar's drug quantity on the marijuana to be 3,509 KG, but adding in the 80 KG of cocaine and converting that to marijuana his total responsibility was 19,509 (U.S.S.G. § 2D1.1, comment, n.10). (R13: 5, 8-9).

Without the 80 KG of cocaine, Cesar's base offense level would be 34 and with a criminal history of category I the applicable guideline range would be 151-188 months imprisonment. The court sentenced Cesar to 360 months on counts one, four, and five to run concurrently. The sentence was at the high end of the sentencing range for a level 40 which is 292-365. *See* U.S.S.G. § 2D1.1(c)(2). The maximum term of imprisonment for count one is not less than 10 years or not more than life. U.S.C. §§ 841(a)(1) and (b)(1)(A). The maximum term for counts four and five is not less than 5 years or more than 40

years. U.S.C. §§ 841(a)(1) and (b)(1)(B) and 18 U.S.C. § 2. Further, the base offense level could have been lower if the court did not use a crude estimate of the total weight and number of loads of marijuana attributed to the conspiracy. In other words, her crude estimation, created the quantity of marijuana used to estimate both brothers base offense level. (R13: 37).

Without the 80 KG of cocaine Hector's base offense level would be 32 and with a criminal history category I the applicable guideline range would be 121-151 months imprisonment. The court sentenced Hector to 360 months on Count One and 240 months on Count Two to be served concurrently. (App. 32). The court sentenced Hector to 360 years on Count one to run concurrent with 240 months on count two. *See* U.S.S.G. § 2D1.1(c)(2). The sentence was at the high end and maximum end of the sentencing ranges using the guidelines and adding in the enhancements found by the court. The statutory maximum term of imprisonment for Count One is not less than 10 years or not more than life. 21 U.S.C. §§ 841(a)(1), (b)(1)(A). The statutory maximum term of imprisonment for Count Two is not more than 20 years. U.S.C. §§ 841(a)(1) and (b)(1)(C) and 18 U.S.C. § 2. The guideline range for imprisonment on a level 40 criminal history category I is 292-365 on Count One and 240 months on count two because the sentencing guideline range cannot be greater than the statutory authorized maximum sentence. U.S.S.G. § 5G1.1(c)(1).

Pending filing of petitioners' brief to the Fifth Circuit, this Court extended its holding in *Blakely v. Washington* to the Federal Sentencing Guidelines (Guidelines) through its opinion in *United States v. Booker*, 543 U.S. 220 (2005).

This Court held in *Blakely v. Washington*, 542 U.S. 296 (2004), that a defendant's Sixth Amendment right to a trial by jury is violated whenever the court imposes a punishment that exceeds the maximum punishment authorized "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* at 303. In *Booker*, the Court extended *Blakely's* constitutional holding to the Sentencing Reform Act (SRA) and the Guidelines. *Booker*, 543 U.S. at 226-27. To remedy the constitutional defect in the federal sentencing scheme, this Court severed the provision of the SRA that made the guidelines mandatory making them advisory. *Id.* at 245.

In their brief to the court of appeals, which was filed after *Booker*, petitioners argued that the district court's imposition of the increased drug quantity and role in the offense enhancement violated their Sixth Amendment right to a jury trial.[2] Because they raised this issue for the first time on appeal, review was for plain error. Although the court of appeals found "there is error that is plain" it reasoned that there was no showing of the third prong of the plain error test. Specifically, the court found that there was no showing that the error affected their substantial rights. In the Fifth Circuit's opinion in, *United States v. Mares*, 402 F.3d 511, 520 (5th Cir.), *cert. denied*, 126 S. Ct.

[2] Petitioners also challenged the enhancements on nonconstitutional grounds. Specifically, the government was unable to show the drug quantity that the court now alleged and that Pedro Ramirez told the court that he was the leader of the conspiracy by hiring Hector and Cesar. Further, the case agent testified that neither Hector nor Cesar were involved in the conspiracy during the entire time. Hector was in at the beginning and completely left and Cesar than became involved at the end of the conspiracy. The case agent explained to the court that neither brother was responsible for all of the loads.

43, 163 L.Ed. 2d 76 (2005), the court of appeals believes that "defendants have the burden of showing that the district judge, 'sentencing under an advisory scheme rather than a mandatory one, would have reached a significantly different result.'" (App. 26) (citing *United States v. Valdez*, 453 F.3d 252, 268 (5th Cir. 2006). Because the appellate court believed the sentencing court did not make any statements indicating it would have sentenced petitioners differently under an advisory scheme it found petitioners did not meet their burden. *Id.* The court stated that the petitioners have not met the standard set forth in *Mares,* even though petitioners urged the court to use the plain error standard for *Booker*, adopted by other circuits, the court chose not to – stating they are bound by their opinion in *Mares*.

REASONS FOR GRANTING PETITION

I. Certiorari is appropriate to decide whether the Fifth Circuit's controlling precedent in *United States v. Mares* violates the Sixth Amendment and this Court's precedent in *United States v. Booker* by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant

A. Introduction

As this Court has continually emphasized, the Federal Constitution requires that any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the

defendant or proved to a jury beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Subsequently, this Court has held pursuant to the Constitution's Sixth Amendment right to a jury trial, that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *See Blakely v. Washington,* 542 U.S. 296 (2004). This Court has applied this constitutional mandate to invalidate Washington state's sentencing scheme and the Federal Sentencing Guidelines to the extent they permitted judicial fact-finding of aggravating factors to justify the imposition of a sentence greater than the maximum authorized by the jury's verdict or defendant's admissions. *United States v. Booker*, 543 U.S. 220 (2005).

In spite of this Court's authorities in this area, the United State Court of Appeals for the Fifth Circuit has now decided that its own precedent in *United States v. Mares*, does not offend the Sixth Amendment even to the extent that it permits a trial judge to impose an upper term sentence based on factors in aggravation found true neither by a jury nor beyond a reasonable doubt nor admitted by the defendant. *See United States v. Mares*, 402 F.3d 511 (5th Cir. 2005). Further, it holds that in reviewing a sentence for plain error a defendant cannot show that his substantial rights have been violated if he cannot show from the record that the judge would have sentenced him differently had the sentencing guidelines been advisory. (App. 26-27).

In light of the Fifth Circuit's position, certiorari is appropriate in this case for two reasons. First, the Fifth

Circuit's opinion in *Mares* directly contravenes this Court's holdings in *Blakely*, *Apprendi*, and *Booker*. Certiorari is therefore necessary to prevent the Fifth Circuit from continuing to violate the constitutional rights of thousands of criminal defendants during sentencing now and in the future. Second, a split of authority, demanding this Court's resolution, has occurred in the federal circuit court of appeals in the aftermath of *Blakely* and *Booker* regarding the application of these cases to sentences handed down by federal district courts. Because this case is an ideal one for resolving the important question presented, this Court should grant certiorari and hold that the Fifth Circuit's holding in *Mares*, as being applied to permit the imposition of enhanced sentences based on judicial fact-finding, violates the Sixth Amendment and this Court's precedent in *Booker*.

B. The Fifth Circuit's opinion in *United States v. Mares* is in direct Conflict with this Court's precedent in *United States v. Booker* and must be corrected to avoid further constitutional infringements.

The Sixth Amendment to the United States Constitution "requires criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 509-10 (1995); *see also Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975); *In re Winship*, 397 U.S. 358, 363-364 (1970). Where proof of a particular fact exposes the defendant to greater punishment than that available in the absence of such proof, that fact is an element of the crime which the Sixth Amendment requires to be proven to a jury beyond a

reasonable doubt. *Apprendi*, 530 U.S. at 490; *Mullaney v. Wilbur*, 421 U.S. at 698; *Specht v. Patterson*, 386 U.S. 605, 607 (1967). In *Apprendi*, this Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490; *see also Ring v. Arizona*, 536 U.S. 584, 609 (2002) (Sixth Amendment mandates that existence of an aggravating factor necessary for imposition of death penalty must be found by a jury rather than a sentencing judge).

Blakely v. Washington, further elaborated on the right to a jury determination of non-recidivist aggravating factors beyond a reasonable doubt. There, this Court held that Washington state's sentencing procedure violated the Sixth Amendment because it permitted the trial court to impose a sentence above the "standard range" or statutory maximum if it found the existence of an aggravation factor demonstrating substantial and compelling reasons for an exceptional sentence. *Blakely*, 124 S. Ct. at 2538. As the Court explained:

> "The 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge many impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional facts." *Id.* at 2537 (emphasis in original)."

The Fifth Circuit uses a system of sentencing choices which violates the Sixth Amendment as did Washington's sentencing scheme at issue in *Blakely*. Specifically, after

this Court's *Blakely* and *Booker* decisions the Fifth Circuit continues to enhance a defendant's sentence based on judge found facts using a preponderance of the evidence standard. The Fifth Circuit allows sentencing courts to enhance a defendant's sentence based on a preponderance of the evidence not on facts neither reflected in the jury verdict nor admitted by the defendant. In *Mares*, defendant challenged his sentence on the ground that the district court enhanced his sentence based on facts found by the judge and that under the *Blakely* and *Booker* decisions, his sentence imposed in a mandatory U.S. Sentencing Guidelines Manual regime violated his right to a jury trial. The court found that defendant had established *Booker* error. However, because defendant failed to establish that his substantial rights were affected by the district court's error in sentencing, it found no plain error and affirmed his sentence. *See Mares*, 402 F.3d 511. In petitioner's case the Fifth Circuit stated that they are bound by their opinion in *Mares*. (App. 27).

In *Mares*, the Fifth Circuit stated that since it was the first sentencing decision rendered by it since this Court's *Booker* opinion, *"we think it appropriate for us to explain at the outset how we understand the Supreme Court expects sentencing will proceed under its decision in Booker/ Fanfan."* *Mares*, 402 F.3d at 517 (emphasis added). The court continues to explain in *Mares* that it was the "mandatory aspect" of the sentencing regime that this Court concluded violated the Sixth Amendment's requirement of a jury trial. *Mares*, 402 F.3d at 518. It did concede however that this Court concluded, that when the sentencing judge bound by mandatory Guidelines increased the sentencing range under the Guidelines based on facts not found by the jury or admitted by the defendant, the sentence

violated defendant's Sixth Amendment right to a jury trial. *Id. Mares*, finds that because this Court excised the provision of the SRA which makes the guidelines mandatory, it left in tact the duty to "consider" the guidelines when determining the applicable guideline range even though a judge is not bound to sentence within that range. *Mares*, 402 F.3d at 519.

In Petitioners' case, the trial itself was constituted defectively because the wrong entity, the judge rather than the jury, convicted petitioner of the true offense for which they were punished. While the jury assuredly found that Petitioners were guilty of the marijuana conspiracy, the district judge found the quantity of drugs to be greater than that found by the jury, she found each had a leader role in the offense, and she added in a cocaine charge all to enhance their sentence beyond what the jury found them guilty. The district judge convicted the Petitioners, by a preponderance of the evidence with respect to the crucial issues, of the drug quantity (relevant conduct), adding an offense (cocaine), and finding a leader role for both. (R14: 6, 8-9, 19).

"When the term 'sentence enhancement' is used to describe an increase beyond the maximum sentence authorized by the jury's verdict, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an 'element' of the offense. *Apprendi*, 530 U.S. at 494 n.19 (2000). Therefore, in Petitioners' cases, the court, not the jury, convicted them of additional offenses and elements of crimes for which they were punished.

What the Fifth Circuit has done is interpret U.S.S.G. § 6A1.3(b) (2004) in its own way, as its reason to still enhance defendant's sentences by judge found facts. Specifically *Mares* states:

> "Relatedly, *Booker* contemplates that, with the mandatory use of the Guidelines excised, the Sixth Amendment will not impede a sentencing judge from finding all facts relevant to sentencing. 125 S. Ct. 750, 764. The sentencing judge is entitled to find by a preponderance of the evidence all the facts relevant to the determination of a Guideline sentencing range and all facts relevant to the determination of a non-Guidelines sentence. Under U.S.S.G. § 6A1.3(b) (2004), which remains in effect, the district court is required to "resolve disputed sentencing factors . . . in accordance with Rule 32(i), Fed. R. Crim. P. . . . The Commentary to this Guideline provides the use of the preponderance of the evidence standard." *See Mares*, 402 F.3d at 519.

The Fifth Circuit holds that if a sentencing judge uses her discretion to impose a sentence within a properly calculated Guideline range, in their reasonableness review it will infer that she has considered all the factors for a fair sentence set forth in the guidelines. *Id.* Thus, it will be rare for a reviewing court to say the sentence is unreasonable. As long as the judge states for the record that she is imposing a sentence within the guideline range little explanation is required. *Id.* at 519. If the judge, however, elects to give a non-guideline sentence she should carefully articulate the reasons for which she concludes that the sentence is appropriate. For example, the court lists reasons as, aggravating circumstances, offense conduct, criminal history, relevant conduct among a few. *Id.* Because

Booker did not excise § 3553(c) it believes that as long as the court states in open court the reasons for the particular sentence imposed, commits no legal error in the procedure followed in arriving at the sentence, and gives appropriate reasons for her sentence the Fifth Circuit will give great deference to that sentence. *Id.*

However, the Fifth Circuit is completely ignoring the fact that a judge cannot enhance a defendant's sentence if the factors used to enhance the sentence were not part of the jury's verdict or admitted by the defendant, thereby completely disregarding this Court's precedent. *See Booker*, 125 S. Ct. at 747. As in the Petitioners' case, the reviewing court in *Mares* found error that was plain in defendant's sentence because the judge enhanced his sentence based on judge found facts, but the error did not affect substantial rights because Mares could not show that the error affected the outcome of the proceeding. *Mares*, 402 F.3d at 522. The court states to meet this standard the proponent of the error must demonstrate a probability sufficient to undermine confidence in the outcome. *United States v. Dominguez Benitez*, 542 U.S. 74, 159 L.Ed. 2d 157, 124 S. Ct. 2333, 2340 (2004). Since the error in *Mares* and in Petitioners' case was using extra verdict enhancements to reach a sentence under Guidelines that bind the judge, the Fifth Circuit asks in both cases whether petitioner can demonstrate that the judge sentencing under an advisory scheme rather than a mandatory one – would have reached a significantly different result. *Id.* at 521. The court in Petitioner's case states that because the judge asked the defendants to ask for mercy for the people buying their drugs that shows that she would not have reached a different result. (App. 27).

This rationale is in error, in the vast majority of cases the record will provide little, if any, reliable indication as to whether the district court would impose a different sentence after a new, constitutionally proper hearing. First, "it would be a mistake to infer from a district court's Pre-*Booker* silence that the district court would not have made a different decision under a different sentencing scheme. *United States v. Ameline*, 409 F.3d 1073, 1082 (9th Cir. 2005) (en banc). Pre-*Booker*, there was no "need or incentive for sentencing courts to note their objections and reservations in sentencing defendants under the then-mandatory Guidelines." *United States v. Barnett*, 398 F.3d 516, 528-29 (6th Cir. 2005). Because such comments served no constructive purpose, "silence often means nothing more than that an experienced judge understood her proper role in the criminal justice system," as to enforce the law rather than to critique its wisdom or fairness. *United States v. Thompson*, 422 F.3d 1285, 1305 (11th Cir. 2005).

Second, even where the record is not altogether "silent," "it would be a mistake to attribute fresh meaning to comments made in an entirely different context." *Ameline*, 409 F.3d at 1082. Given that, when spoken, such comments have no impact on the defendant's sentence, they may simply reflect "some encouraging words for the benefit of the defendant's family, an attempt to influence the Sentencing Commission on matters of general policy, or even an effort to avoid personal responsibility for a particular sentence. *Id.*

Finally, in cases of silence or comment, it is "impossible to tell what considerations counsel for both sides might have brought to the sentencing judge's attention had they known that they could urge the judge to impose a non-Guidelines sentence." *United States v. Crosby*, 397 F.3d

103, 115 (2nd Cir. 2005). That is, even accepting the uncertain proposition that a judge's silence or comments accurately reflect her impressions of the original sentencing hearing, they are still an unreliable predictor of the outcome of a new, constitutionally proper hearing following different evidence and argument based on the post-*Booker* federal sentencing model. For all theses reasons, perusing the transcript for "magic words" on which to base speculations as to the outcome of a new sentencing hearing has proven to be an inherently "arbitrary" method of appellate review. *Thompson*, 422 F.3d at 1305.

Because there is no reliable way to predict what sentence the district judge would select under advisory guidelines, after a hearing at which the defendant could present additional or different arguments tailored to realities of the new sentencing regime, the effects of constitutional *Booker* error are inherently unquantifiable and indeterminate, and appellate courts can only speculate as to the possible result of a new, constitutionally proper hearing.

In light of the Fifth Circuit's position in *Mares* regarding its ability to enhance a sentence based on judge found facts using a preponderance of the evidence standard, certiorari is necessary to make the Fifth Circuit, and its interpretation of *Booker,* adhere to constitutionally acceptable standards. More importantly, this Court should grant certiorari on the issue presented to prevent the Fifth Circuit from continuing every day to violate the constitutional rights of countless criminal defendants facing sentencing in the courts within its jurisdiction.

II. The Court should grant the petition to resolve the clear, three-way circuit split concerning the proper analysis of *Booker* errors under the plain error rule.

Certiorari is also appropriate to resolve the stark split of authority which has developed in the Federal Circuits regarding the application of *Booker* to review of district court sentences. There is a clear, three-way split with respect to the proper application of the plain-error test in this context, with further, subtle variations within each broad category. *See United States v. Pirani*, 406 F.3d 543 (8th Cir. 2005) (en banc) (Bye, J., dissenting) (describing the "split as a three-ring circus with twelve unique acts each attempting to dazzle us with its compelling logic"). "This wide ranging circuit split results in the disparate treatment of criminal defendants throughout the nation. Such uneven administration of justice cries out for a uniform declaration of policy by the Supreme Court." *United States v. Gonzalez-Huerta*, 403 F.3d 727, 763 (10th Cir.) (en banc) (Lucero, J., dissenting), *cert. denied*, 126 S. Ct. 2495 (2005). While such a split would justify this Court's review under any circumstances, review is essential here because this split "under-mines the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways." *Booker*, 543 U.S. at 252.

Some circuits remand all cases for re-sentencing regardless of whether the *Booker* error was preserved in the trial court. *See United States v. Hughes*, 396 F.3d 374 (4th Cir. 2005); *United States v. Oliver*, 397 F.3d 369 (6th Cir. 2005), and *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005). The First Circuit follows an approach similar to the Eleventh Circuit and considers remand on a

record specific case-by-case basis. *See United States v. Antonakopoulos*, 399 F.3d 68 (1st Cir. 2005); *United States v. Rodriguez*, 398 F.3d 1291 (11th Cir. 2005). The Second Circuit remands the case to the district court to answer the question whether it would have imposed a different sentence if the judge had been sentencing under an advisory regime. *United States v. Crosby*, 393 F.3d 103 (2nd Cir. 2005).

The Third and Sixth Circuits have held that, at least presumptively, all *Booker* errors affect substantial rights. *United States v. Davis*, 407 F.3d 162, 163-66 (3d Cir. 2005) (en banc); *United States v. Barnett*, 398 F.3d 516, 526-29 (6th Cir. 2005). The Fourth Circuit has held that while constitutional *Booker* errors necessarily affect substantial rights, (*United States v. Hughes*, 401 F.3d at 548-55 (4th Cir. 2005)), a defendant claiming only statutory error must establish prejudice *United States v. White*, 405 F.3d 208, 217-20 (4th Cir.), *cert. denied*, 126 S. Ct. 668 (2005). Occupying a middle ground, the Second, Seventh, Ninth, and D.C. Circuits have all employed some sort of "limited remand" procedure under which the district court rather than the court of appeals is tasked with determining whether the third prong of the plain-error test is met. *Crosby*, 397 F.3d at 117-20 (2d Cir. 2005); *United States v. Paladino*, 401 F.3d 471, 483-84 (7th Cir. 2005); *Ameline*, 409 F.3d at 1079; *United States v. Coles*, 403 F.3d 764, 769-771 (D.C. Cir. 2005). Finally, like the Fifth Circuit, the First, Eighth, Tenth, and Eleventh Circuits have all required the defendant to show that his sentence was affected by the mandatory application of the Guidelines. *Mares*, 402 F.3d 511, 521 (5th Cir.), *cert. denied*, 126 S. Ct. 43 (2005); *Antonakopoulus*, 399 F.3d 68, 75 (1st Cir. 2005); *Pirani*, 406 F.3d at 550-53 (8th Cir. 2005); *United States v.*

Dazey, 403 F.3d 1147, 1175-77 (10th Cir. 2005); *United States v. Rodriguez*, 398 F.3d 1291, 1299 (11th Cir. 2005).

One of the primary purposes of the SRA was to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Surely, a disparity attributable to nothing more than where the defendant was sentenced qualifies as an "unwarranted disparity." Yet, that is the upshot of the current circuit split; while defendants in seven circuits will receive a new, constitutionally proper sentencing hearing, or at least a "limited remand," the vast majority of similarly situated defendants in the other five circuits will not. Thus, this circuit split is not only of surpassing constitutional importance but it is also of critical importance to the consistent administration of justice under the SRA.

Since this apparent split of authority has arisen amongst the federal circuit's it cannot be resolved without this Court's intervention. Thus, in order to correct the constitutional analysis in the circuits which, contrary to *Booker*, uphold sentencing schemes permitting imposition of enhanced sentences based on judicial fact-finding, not jury findings or defendant's admissions, the Court should grant this petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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In the
United States Court of Appeals
for the Fifth Circuit.

No. 04-50499

DR-03-CR-108(02), (03)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CESAR ARRNOLDO VALDEZ,
HECTOR RAUL VALDEZ,

Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Texas.

(Filed June 15, 2006)

Before SMITH, GARZA, and OWEN,
Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Hector and Cesar Valdez appeal their convictions and sentences on various drug charges. We affirm the convictions and Hector's sentence. We vacate Cesar's sentence and remand for re-sentencing.

I.

This case involves a drug conspiracy to transport large quantities of marijuana and, on at least two occasions, cocaine from Del Rio, Texas, to Dallas, Texas. Five defendants were charged in an eight-count indictment for their alleged involvement in the operation, but only the appellants, Hector and Cesar Valdez, were convicted following a jury trial.[1]

Hector and Cesar were found guilty of conspiracy to possess with intent to distribute 1,000 kilograms or more of marihuana, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846 (Count One). Hector was also found guilty of aiding and abetting possession with intent to distribute more than 50 kilograms of marihuana on or about June 11 to June 13, 2001, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C), and 18 U.S.C. § 2 (Count Two); he was found not guilty of the two cocaine-related charges against him (Counts Seven and Eight). Cesar was found guilty of aiding and abetting possession with intent to distribute more than 100 kilograms of marihuana on or about October 16, 2001 (Count Four), and on or about December 2, 2001 (Count Five), in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B), and 18 U.S.C. § 2.

The court sentenced Hector to 360 months of imprisonment on Count One (the conspiracy/marihuana charge) and 240 months on Count Two (the aiding and abetting charge), the sentences to run concurrently; 5 years of supervised release; and a $25,000 fine. Cesar was sentenced to 360 months on each of Counts One (conspiracy),

[1] One co-defendant pleaded guilty and the other two were acquitted.

Four (aiding and abetting/October 16, 2001) and Five (aiding and abetting/December 2, 2001), the sentences to run concurrently; 5 years of supervised release; and a $25,000 fine.

Hector and Cesar appeal, alleging that the evidence is insufficient to support their convictions and that the district court abused its discretion by denying their motions for severance, made clearly erroneous factual findings with regard to their relevant conduct and alleged leadership roles, and committed reversible *Booker* error.

II.

Where, as here, the defendants moved for judgment of acquittal at the close of the evidence, we decide whether the evidence is sufficient by "viewing the evidence and the inferences that may be drawn from it in the light most favorable to the verdict" and determining whether "a rational jury could have found the essential elements of the offenses beyond a reasonable doubt." *United States v. Pruneda-Gonzalez*, 953 F.2d 190, 193 (5th Cir. 1992). The jury has the sole responsibility for weighing the evidence and making credibility determinations. *United States v. Jaramillo*, 42 F.3d 920, 923 (5th Cir. 1995). "It is not necessary that the evidence exclude every rational hypothesis of innocence or be wholly inconsistent with every conclusion except guilt, provided a reasonable trier of fact could find the evidence establishes guilt beyond a reasonable doubt." *Pruneda-Gonzalez*, 953 F.2d at 193. "However, we must reverse a conviction if the evidence construed in favor of the verdict gives equal or nearly equal circumstantial

support to a theory of guilt and a theory of innocence of the crime charged."[2]

A.

To prove conspiracy to possess and distribute a controlled substance, the government must show beyond a reasonable doubt (1) the existence of an agreement between two or more persons to violate narcotics laws; (2) the defendant's knowledge of the agreement; and (3) his voluntary participation in the conspiracy.[3]

Mere presence at a crime scene or association with conspirators is not enough to prove participation in a conspiracy, but the "agreement, a defendant's guilty knowledge and a defendant's participation in the conspiracy all may be inferred from the development and collocation of circumstances."[4] "[A] defendant may be convicted on the uncorroborated testimony of a coconspirator who has accepted a plea bargain unless the coconspirator's testimony is incredible." *United States v. Villegas-Rodriguez*, 171 F.3d 224, 228 (5th Cir. 1999). "Testimony is incredible as a matter of law only if it relates to facts that the witness could not possibly have observed or to events which could not have occurred under the laws of nature."

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[2] *Jaramillo*, 42 F.3d at 923; *see also United States v. Gonzales*, 436 F.3d 560, 571 (5th Cir.), *cert. denied*, 126 S. Ct. 2045 (2006), *and cert. denied*, 2006 U.S. LEXIS 4372 (U.S. June 5, 2006) (No. 05-1324), *and cert. denied*, 2006 U.S. LEXIS 4373 (U.S. June 5, 2006) (No. 05-10509).

[3] *United States v. Pompa*, 434 F.3d 800, 806 (5th Cir.2005); *United States v. Sacerio*, 952 F.2d 860, 863 (5th Cir. 1992).

[4] *United States v. Lentz*, 823 F.2d 867, 868 (5th Cir. 1987); *see also United States v. Norman*, 415 F.3d 466, 471 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1087 (2006).

United States v. Bermea, 30 F.3d 1539, 1552 (5th Cir. 1994).

There is ample evidence to support the conspiracy charge against Hector. Although much of the evidence consisted of testimony by three coconspirators – Alfred Garcia, Pedro Ramirez, and Javier Cardenas – who accepted plea bargains and hoped for sentence reductions in exchange for their testimony, their testimony is not incredible, and each coconspirator's testimony tends to corroborate the testimony of the other coconspirators. Moreover, the jurors were adequately informed during direct and cross-examination about the coconspirators' motivation for testifying, and the jury was free to believe or disbelieve their testimony.

Garcia testified that Hector and Ramirez started transporting marihuana out of Garcia's house in January 2001. Hector and Ramirez would pick up the marihuana from a supplier in Mexico, load it into Hector's truck, and take it back to Garcia's house to break up and repackage in duffle bags. Hector was occasionally involved in breaking down the marihuana and would wear socks on his hands to keep from getting fingerprints on the drugs. Hector's truck would be used to transport the drugs to Dallas, where a man named Rudy would buy them. Hector and Ramirez would pay him when he transported the drugs from Del Rio to Dallas.

Garcia's testimony was corroborated by Ramirez, who testified about the same agreement, which involved picking up the marihuana from the border, repackaging it into duffle bags at Garcia's, and transporting it to Dallas in Hector's truck. According to Ramirez, the money for each load would sometimes be split three ways between

Ramirez, Hector, and Garcia, although sometimes Garcia would get paid less. Hector was paid regardless of whether he actually transported the marihuana. Ramirez also stated that Hector came up with the idea of leaving at 5:30 a.m. to avoid the Border Patrol.

Cardenas's testimony further corroborates the existence of the conspiracy and Hector's participation therein. Cardenas testified that Ramirez recruited him to drive a load to Dallas. Ramirez corroborated this testimony. Cardenas further testified that he picked up the marihuana by the river and unloaded it at Garcia's house; Garcia corroborated this testimony. Ramirez drove him to Hector's house to pick up Hector's truck with which to transport the drugs. According to Cardenas, once he got to Hector's place, Hector wanted him to drive Ramirez and Hector around the block so they could talk without the next-door neighbor, a sheriff, overhearing.

Cardenas was arrested on June 13, 2001, before reaching Austin, and he was driving Hector's truck with over 200 pounds of marihuana and over 130 pounds of cocaine. The arresting officer testified about the arrest and stated that an insurance card, bearing Hector's name, was found in the truck.[5] A rational jury could have found

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[6] Testimony by Hector's mistress, Julie Morales, corroborates the existence of the conspiracy and his involvement in it. Julie testified that she met Hector at the Cora Street home (Garcia's house), where she saw Hector and Ramirez unload what looked like bales of hay. When Julie asked Hector what the bales were, he said "skunk weed." Julie was frightened by the large quantity of the drugs, and she called a friend to pick her up. Hector told her not to tell anyone what she had seen, and he "joked" that he would burn her in her car and have her followed if she did. After the incident, Julie said Hector "was always paranoid about who [she] was talking to" and "would pat [her] down to make sure [she] wasn't wired." Finally, she testified that Hector told

(Continued on following page)

Hector guilty of conspiracy beyond a reasonable doubt on the basis of all the evidence.

B.

As we have explained, the evidence was sufficient to support the finding that a conspiracy to possess with intent to distribute marihuana existed between Hector, Ramirez, and Garcia starting in January 2001. There is similarly ample evidence supporting the finding that Cesar had knowledge of the conspiracy and voluntarily participated in it sometime between January 2001 and October 2002.

Garcia and Ramirez testified that, after Cardenas was busted with marihuana and cocaine in Hector's truck, Cesar took over Hector's role in the operation. They testified that Cesar would recruit drivers to go pick up the marihuana at a rest area outside of Comstock (which is near Del Rio) and that the marihuana would be loaded onto Cesar's blue Chevy Silverado (although Cesar would not always accompany the drivers). According to Ramirez and Garcia, the marihuana was often taken from Comstock to Cesar's trailer in Austin before it was repacked and moved north to Dallas, although sometimes the loads were taken straight to Dallas.

Garcia testified that Cesar would be paid the same amount that his brother, Hector, had been paid during his involvement. Ramirez stated that, after Cesar took over Hector's role, the same person in Mexico was supplying

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her he had made $275,000 from the drug business and that he had it stashed away somewhere. (This money was not recovered in a search of Hector's residence.)

the marihuana, and the same person in Dallas was buying the loads and paying the same amount as before.

The testimony of Antonio Reyes also corroborated Garcia's and Ramirez's testimony regarding Cesar's knowledge of and participation in the conspiracy. He testified that he saw large quantities of marihuana at Cesar's trailer home and that Cesar kept a large amount of money under his mattress. He also stated that Cesar had recruited him.[6]

Reyes testified that he drove to Del Rio on two other occasions for Cesar; on the first, the marihuana was never delivered, and on the second, he was arrested. On December 2, 2001, Reyes, according to his testimony and that of the arresting officer, was arrested transporting 256 pounds of marihuana; he was driving a Chevrolet Blazer that he claimed was provided by Cesar.

Macabee Memmen further corroborated Cesar's involvement in the conspiracy. He testified that Cesar would occasionally store marihuana for brief periods at his apartment. Cesar asked him to pick up a load of marihuana in Comstock, but he declined. Memmen stated that he and his fiance accompanied Cesar to Dallas one time, and they followed Jose Leal, who was driving a load of

[6] Reyes further testified that, on one occasion, Cesar offered him $8,000 to drive to Comstock to pick up marihuana and that Cesar accompanied him on the trip. Reyes testified that he and Garcia picked up the marihuana and that Garcia and Cesar were supposed to follow Reyes back to Austin. According to Reyes, however, Cesar had planned to steal that particular load and instructed Antonio to "lose" Garcia and Cesar. Reyes testified that Cesar further instructed him to take the load to an apartment in Austin, where a guy named Macabee Memmen lived; Macabee corroborated this account.

marihuana in Cesar's Chevrolet Silverado. Based on all the testimony, a rational jury could have concluded that Cesar had knowledge of and voluntarily participated in the conspiracy.

C.

Defendants complain that the evidence does not support the jury's finding, in response to a special interrogatory, that the amount of marihuana involved in the conspiracy was 1000 kilograms or more (approximately 2200 pounds). This claim is without merit. According to Garcia, Hector was actively involved in the drug transportation operation from January to June 2001, during which time 10 loads were transported, with each load weighing between 500 and 1000 pounds. Garcia testified that he occasionally weighed the loads.

Ramirez similarly testified that 10 loads were transported between January and June of 2001, but he estimated that each load weighed between 400 and 500 pounds. His estimate was based on the amount of money paid for each load, which was between $15,000 and $20,000. At $50 per pound, this would actually yield 300 to 400 pounds per load. Finally, over 200 pounds of marihuana was seized from Hector's truck in June 2001, in addition to approximately 130 pounds of cocaine.

A rational jury could have concluded that based on the quantity of drugs seized, at least 330 pounds of marihuana was transported each time, because when cocaine was not transported, more marihuana was transported in its place. Thus, even a conservative estimate based on the testimony and actual seizure would yield at least 3300 pounds of

marihuana during Hector's involvement in the conspiracy, which is in excess of 1000 kilograms.

Similarly, Ramirez testified that 10 loads of marijuana were transported after the June 13 bust, when Cesar took over Hector's role and was plainly participating in the conspiracy. Garcia testified that, after the June bust, each load was closer to 100 to 200 kilograms. Moreover, the actual loads seized in October and December 2001 were just over 100 kilograms, yielding a conservative estimate of 1000 kilograms. A rational jury could have concluded that at least 1000 kilograms was transported during Cesar's involvement in the conspiracy.

D.

Defendants complain that the evidence obviously shows that neither Hector nor Cesar was involved in the conspiracy throughout the time alleged in the indictment, or on or about January 1, 2001 until on or about October 14, 2002. "[A]n allegation as to the time of the offense is not an essential element of the offense charged in the indictment," and, within reasonable limits, the offense need only occur before the return of the indictment and within the statute of limitations. *Russell v. United States*, 429 F.2d 237, 238 (5th Cir. 1970) (per curiam). Moreover, the "prosecution, as a consequence of the use of the 'on or about' designation, was not required to prove the exact date; it suffices if a date reasonably near is established." *United States v. Grapp*, 653 F.2d 189, 195 (5th Cir. Unit A Aug. 1981). Therefore, that defendants may not have been involved in the conspiracy throughout its existence does not undermine the jury's decision that during the time

that each of them was plainly involved, 1000 kilograms or more of marihuana was transported.

III.

Defendants challenge the sufficiency of the evidence as to their aiding and abetting convictions. "To prove aiding and abetting of a criminal venture, the government must show that the defendant '(1) associated with the criminal enterprise; (2) participated in the venture; [and] (3) sought by his action to make the venture succeed.'" *Norman*, 415 F.3d at 471 (quoting *United States v. Tenorio*, 360 F.3d 491, 495 (5th Cir.), *cert. denied*, 542 U.S. 930, *and cert. denied*, 542 U.S. 930 (2004)).[7]

A.

There was ample evidence supporting a guilty verdict on the count charging Hector's aiding and abetting Javier Cardenas' possession with intent to distribute (Count Two). Javier, driving Hector's truck, was arrested on June 13, 2001, with 210.5 pounds of marihuana. The evidence recounted above could be rationally construed as showing that Hector voluntarily lent his truck to Javier for the purpose that Javier transport the marihuana and that Hector thus voluntarily associated with, participated in, and "sought by his action" of lending the truck to make the distribution venture succeed.

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[7] To convict of possession of marihuana with intent to distribute, the government must prove (1) possession, (2) knowledge, and (3) intent to distribute. *United States v. Cartwright*, 6 F.3d 294, 299 (5th Cir. 1993). Intent to distribute may be inferred from the large quantity of drugs involved. *Id.*

B.

The evidence was sufficient to support a guilty verdict on the count charging Cesar's aiding and abetting Garcia's possession with intent to distribute (Count Four). On October 16, 2001, Garcia was arrested after the police discovered 236 pounds of marihuana at his house on Cora Lane. The jury could have rationally construed the following testimony as demonstrating that Cesar aided and abetted Garcia's possession with intent to distribute.

First, Reyes's testimony about the load he ran for Cesar in December 2001 supports a rational inference that Cesar was still involved in the conspiracy in October 2001, at the time of the seizure. Moreover, Garcia testified that, although his house was not generally utilized for the transportation scheme following the June 13 bust, it was being used on this particular occasion. He explained that the Comstock location that they had been using became suspicious after Reyes "lost" a load he had picked up there (the load that Cesar actually stole) and that they had to go back to using his trailer. Garcia's testimony supports a rational inference that the load seized from his house on October 16, 2001, was part of the conspiracy in which Cesar took part.

Therefore, the jury could have rationally inferred that the load seized from Garcia's house was part of the criminal venture of which Cesar was a participant and that Cesar sought to make the venture succeed by aiding with the distribution of the marihuana: by lending his truck for the marijuana to be transported, by recruiting drivers for the distribution, and/or by allowing the marihuana to be stored at his house in Austin. That is, the jury could have rationally inferred that the load found at Garcia's house

was meant to be transported (from the quantity of the drugs seized and the circumstances of the conspiracy) and that Cesar facilitated the transportation/distribution part of the venture. As we have noted repeatedly, the type of evidence that supports a conspiracy conviction typically supports an aiding and abetting conviction. *United States v. Casilla*, 20 F.3d 600, 603 (5th Cir. 1994).

C.

Count Five involved the arrest of Antonio Reyes on December 2, 2001; the evidence previously recounted emphatically supports a conviction on this aiding and abetting count. Reyes testified that he was picking up a load for Cesar, in a vehicle Cesar had provided, when he was arrested with 256 pounds of marihuana. Reyes's testimony supports a rational inference that this load was a part of the same criminal venture and that Cesar sought to make the venture succeed by providing a vehicle with which to transport the marihuana.

IV.

Defendants' argument that the district court erred in denying the motion for severance is without merit. We review a denial of severance for abuse of discretion. *United States v. Ramirezza*, 78 F.3d 179, 184 (5th Cir. 1996). Rule 8(b) of the Federal Rules of Criminal Procedure allows for joinder of defendants in a single indictment "if they are alleged to have participated . . . in the same series of acts or transactions constituting an offense or offenses." As a general rule, "persons indicted together should be tried together, especially in conspiracy cases." *United States v. Pofahl*, 990 F.2d 1456, 1483 (5th Cir. 1993). Federal Rule

of Criminal Procedure 14 allows, however, severance of properly joined defendants on a showing of prejudice to a defendant or the government.

To show that the denial of severance was an abuse of discretion, the defendant must demonstrate that "(1) the joint trial prejudiced him to such an extent that the district court could not provide adequate protection; and (2) the prejudice outweighed the government's interest in economy of judicial administration." *United States v. Richards*, 204 F.3d 177, 193 (5th Cir. 2000) (internal quotations and citations omitted).

Neither Hector nor Cesar has shown prejudice. They argue that the trial was complex and that the acquittal of two of the codefendants, based on largely the same evidence presented against Hector and Cesar, shows that the jury was confused by the evidence.[6] First, a "general description of the complexity of a trial is not sufficient to show the 'specific and compelling prejudice' necessary for reversal of the denial of a motion to sever." *Id.* Moreover, a review of the trial transcripts reveals that the bulk of the testimony related to Hector's and Cesar's participation and leadership roles in the conspiracy, so it is unlikely that the jury could have been confused about the two brothers' identities or actions. If anything, the fact that the jury acquitted two of the codefendants and found Hector not guilty on the two cocaine charges shows that it was able to

[6] Hector's motion was not timely under Federal Rule of Criminal Procedure 12 because he did not make it pre-trial. The district court still considered the motion, though, along with Cesar's timely motion.

parse the evidence and consider it separately for each defendant and each count.[9]

Finally, the district court gave the jury a cautionary instruction to consider the evidence against each defendant separately.[10] Defendants' severance argument is completely without merit.

V.

Although the appellants frame their third issue as alleged *Booker* error,[11] they seem to be complaining, at least in part, that the district court's leadership adjustment and relevant conduct determination – specifically the estimation of the amount of marihuana involved and the inclusion of cocaine – was unsupported by the evidence.[12] This court reviews a district court's factual findings for clear error.[13] We "will deem the district court's factual

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[9] *United States v. Ellender*, 947 F.2d 748, 755 (5th Cir. 1991) ("[A]cquittals as to some defendants on some counts support an inference that the jury sorted through the evidence and considered each defendant and each count separately.").

[10] *United States v. Hogan*, 763 F.2d 697, 705 (5th Cir. 1985) ("Appropriate cautionary instructions can decrease the possibility that the jury will improperly transfer proof of guilt from one defendant to another.").

[11] *See United States v. Booker*, 543 U.S. 220 (2005).

[12] *See* Appellants' Brief at 46-48 ("Hector and Cesar submit that there was not even a preponderance of the evidence to add the cocaine amounts to their sentences since the jury acquitted Hector on all counts regarding cocaine, and Cesar was never charged with any cocaine. . . . Moreover, there was not ever a preponderance of the evidence that Hector or Cesar Valdez were leaders in the conspiracy.").

[13] *United States v. Cabrera*, 288 F.3d 163, 168 (5th Cir. 2002); *see also United States v. Villanueva*, 408 F.3d 193, 203 n.9 (5th Cir.) ("Post-

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findings clearly erroneous only if, based on the entire evidence, [the court is] left with the definite and firm conviction that a mistake has been committed." *Cabrera*, 288 F.3d at 168 (internal citations and quotations omitted).

"A factual finding is not clearly erroneous if it is plausible in light of the record read as a whole." *Villanueva*, 408 F.3d at 203 n.9. A district court "may adopt the facts contained in a [presentence report ('PSR')] without further inquiry if those facts have an adequate evidentiary basis with sufficient indicia of reliability and the defendant does not present rebuttal evidence or otherwise demonstrate that the information in the PSR is unreliable." *Cabrera*, 288 F.3d at 173-74. "The defendant bears the burden of showing that the information in the PSR relied on by the district court is materially untrue." *United States v. Valencia*, 44 F.3d 269, 274 (5th Cir. 1995).

A.

Hector and Cesar argue that the evidence does not support the four-level adjustment for their alleged leadership roles in the organization. Section 3B1.1(a) of the United States Sentencing Guidelines authorizes this adjustment if the "defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." In making the leadership determination, the court should consider such factors as the "exercise of decision making authority, the nature of participation in the commission of the offense, the

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Booker, we continue to apply the same standard of review to claims of erroneous fact-finding. . . ."), *cert. denied*, 126 S. Ct. 268 (2005).

recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others." U.S.S.G. § 3B1.1 cmt. n.4 (2003). "The district court may find that a defendant exercised a leader/organizer role by inference from the available facts." *Cabrera*, 288 F.3d at 174.

The district court, after reviewing the trial transcripts, adopted the factual findings in the PSR, which indicated that Hector received a greater amount of the profits, made technical decisions about concealing the drugs, and planned the route to be taken by the drivers. Although Hector objected at the sentencing hearing that the trial evidence supports, at most, a three-level adjustment for his role as a manager, Ramirez's and Garcia's testimony discussed above provides an adequate evidentiary basis for the PSR's findings.[14]

Based on this evidence, the district court could have inferred that Hector exercised decision-making authority

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[14] Specifically, Ramirez testified that he, Hector, and Garcia would sometimes split the money for each load three ways but that Garcia would get paid less when he was just storing the marihuana at his house instead of transporting it to Dallas. Ramirez testified that, unlike Garcia, Hector would get paid the same regardless of whether he accompanied the drivers when they transported drugs to Dallas.

Moreover, Garcia testified that "we" (seemingly including Hector) would conceal the drugs in Hector's truck under a board, brown paper, fences, and pipes to make it look like a farm truck, from which the court could have rationally inferred that Hector was involved in the decision-making of how drugs would be concealed in his truck. Furthermore, Ramirez and Garcia testified that Hector devised the plan for the drivers to leave at 5:30 a.m. by a particular route so as to minimize the chance of being stopped by the Border Patrol.

and participated in organizing the offense to such a degree that he was a leader rather than a manager. The fact that Ramirez was also probably a leader (because he also received a larger share of the profits, he recruited Hector, and he dealt with the Mexican suppliers) does not undermine the finding that Hector was a leader: A conspiracy can have more than one leader. *Morphew v. United States*, 909 F.2d 1143 (8th Cir. 1990).[15]

B.

In making the leadership determination as to Cesar, the court adopted the factual findings in the PSR, which stated that Cesar "made arrangements with the buyers in the United States," "organize[d] the transportation of drugs to Austin," and hired drivers. Although Cesar objected that, at most, he introduced some drivers to Ramirez and Garcia, the testimony at trial provides an adequate evidentiary basis for the facts alleged in the PSR.[16] Based on all the evidence, the court did not clearly

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[15] *See also United States v. Yeager*, 331 F.3d 1216 (11th Cir. 2003) (holding that offense level of each participant in conspiracy of *two* persons could be enhanced for a leadership role if both exercised authority and control over distinct portion of criminal activity).

[16] Ramirez and Garcia testified that, after Hector withdrew from the organization, Cesar took over his brother's role and share of the profits and began to recruit drivers for the operation. There was also evidence that Cesar made arrangements to pay the drivers he recruited. Antonio Reyes testified that Cesar recruited him to drive a few loads and offered to pay him $8,000 for one of the loads. Memmen similarly testified that Cesar recruited him to store loads at his apartment on occasion and attempted to recruit him to pick up a load from Comstock; Cesar would pay Macabee with marihuana for personal use.

Furthermore, according to Reyes, Cesar organized the theft of one load from the suppliers in Mexico; Italo White testified that Cesar

(Continued on following page)

err by adopting the findings in the PSR that Cesar was a leader, so a four-level adjustment was appropriate.

C.

Defendants complain of the district court's inclusion of cocaine in their relevant conduct determinations. Specifically, adopting the findings in the PSR, the court attributed 80 kilograms of cocaine to both Hector and Cesar. The guidelines assign a base offense level of 36 for quantities of marihuana between 10,000 and 30,000 kilograms, *id.* § 2D1.1(2); with the four-level leadership adjustment, each defendant had an offense level of 40, for which the guidelines authorize a sentence of 292 to 365 months.[17]

Without the inclusion of cocaine, Hector was attributed with 2,370 kilograms of marihuana, which would yield a base offense level of 32. *Id.* § 2D1.1(4) (assigning an offense level of 32 for at least 1000 but less than 3000 kilograms of marihuana). With the four-level leadership adjustment, the offense level is 36, for which the guidelines authorize a sentence of 188 to 235 months. Cesar, who was attributed with 3509 kilograms of marihuana, would have a base offense level of 34 and a total offense level, with the leadership adjustment, of 38, for which the

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recruited him to falsify a document for this endeavor to show that the load had been seized by police. Moreover, Cesar provided his truck for transporting loads of marihuana, and the loads would often be repackaged at his home in Austin before being transported north. Cesar would also occasionally follow the drivers when they transported the drugs to Dallas.

[17] Under the guidelines, the cocaine is converted into an equivalent quantity of marihuana: One gram of cocaine is equivalent to 200 grams of marihuana; thus, 80 kilograms of cocaine is equivalent to 16,000 kilograms of marihuana. U.S.S.G. § 2D1.1 cmt. n.10.

guidelines authorize a sentence of 235 to 293 months. Each defendant was sentenced to 360 months, which would have been well outside the guideline range, had the district court excluded the cocaine from the relevant conduct determination.

Hector's argument that the cocaine cannot be included in his relevant conduct because the jury acquitted him of the cocaine charges is meritless. "A jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."[18] There was easily a preponderance of the evidence to support the inclusion of cocaine in the relevant conduct determination for Hector. Notably, when Javier Cardenas was busted on June 13, 2001 driving Hector's vehicle, the police seized 60 kilograms of cocaine along with the marihuana. Moreover, Ramirez testified that he and Hector ran a 20-kilogram load of cocaine before the June 13 bust.

D.

The inclusion of cocaine in Cesar's relevant conduct is more problematic. Although the government's failure to charge Cesar with a cocaine offense does not prevent the district court from including cocaine in his relevant conduct, the finding must still be supported by a preponderance of the evidence.[19]

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[18] *United States v. Cathey*, 259 F.3d 365, 368 (5th Cir. 2001) (quoting *United States v. Watts*, 519 U.S. 148, 157 (1997)).

[19] *United States v. Partida*, 385 F.3d 546, 566 (5th Cir. 2004) ("Due to a standard of proof at sentencing lower than the proof necessary to

(Continued on following page)

According to the evidence produced at trial, cocaine was only transported on June 13, 2001 and once before that. If Cesar did not join the conspiracy until after the June 13 bust, the district court could not attribute the cocaine quantities to him.[20] The court concluded, however, that Cesar entered the conspiracy from its inception and that the cocaine could be attributed to him.

The testimony was somewhat ambiguous as to whether Cesar was involved in the conspiracy from its inception. We do not decide that question for the purpose of this issue, because even if the court did not clearly err by finding that Cesar joined the conspiracy at its inception, the sentencing guidelines would allow the district court to include the cocaine in Cesar's relevant conduct only if it was a "reasonably foreseeable act[] . . . of others in furtherance of the jointly undertaken criminal activity."[21]

Cocaine was transported twice during the conspiracy. Ramirez stated that he and Hector "did a load" of cocaine, weighing 20 kilograms, before the June 13 bust. Sixty kilograms of cocaine was seized in the bust, but it was

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convict at trial, the scope of a sentencing court's fact finding is not limited to considering only the conduct of which the defendant was formally charged or convicted."), *cert. denied*, 544 U.S. 911 (2005).

[20] U.S.S.G. § 1B1.3 cmt. n.2-("A defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct.").

[21] U.S.S.G. § 1B1.3(a)(1)(B). Although the "reasonably foreseeable" requirement does not apply to conduct in which the defendant was personally involved or which the defendant aided and abetted, the trial testimony does not support an inference that Cesar was personally involved in, or aided and abetted, the two cocaine distributions at issue.

concealed in the bale of marihuana and was not discovered until the crime lab cut the bale open. The remainder of the testimony regarding the drug conspiracy describes it as a marihuana transportation scheme. Although the government attempts to describe the conspiracy as a "drug transportation" conspiracy, which would make the cocaine foreseeable, this begs the question of foreseeability, transforming the inquiry into the nearly identical inquiry of whether this was a marihuana transportation conspiracy or a drug transportation conspiracy.

Arguably, these two loads of cocaine, at least one of which was hidden inside a bale of marihuana, would not be reasonably foreseeable to a member of the conspiracy who, according to the trial testimony, dealt only with marihuana. That is, there is no evidence that Cesar had a "leadership" role in the conspiracy before June 13, so there is no indication that he had knowledge of everything that was transported. Given the isolated and secretive nature of the two cocaine transports, the cocaine could be reasonably foreseeable to Cesar only if his mere involvement in the conspiracy automatically makes the transportation of any drugs reasonably foreseeable to him. But "the reasonable foreseeability of all drug sales does not automatically follow from membership in the conspiracy." *United States v. Wilson*, 116 F.3d 1066, 1077 (5th Cir.), *vacated in part on other grounds sub nom. United States v. Brown*, 123 F.3d 213 (5th Cir. 1997) (en banc). Because the evidence does not support an inference that the cocaine was reasonably foreseeable to Cesar, we vacate his sentence and remand for resentencing.

E.

Defendants contest the adoption of the PSR's findings with respect to the total quantity of marihuana attributable to them. The marihuana calculation only affects Cesar, however.[22] The PSR states that he was responsible for 3509 kilograms of marihuana.[23] This amount is unquestionably supported by the evidence, with two exceptions that reduce the quantity found by about 23 kilograms, so it would not affect the base offense level.[24]

The evidence also supports the estimation following the June 13, 2001, bust (*i.e.* eight loads at 100 kilograms). Trial testimony indicated that ten loads, weighing 100 to 200 kilograms each, were transported following the bust, and this estimate seemed to include the two loads actually seized in October and the one load seized in December. Because the PSR's count would yield eleven loads (eight

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[22] Because of the amount of cocaine found in Hector's car during the June 13, 2001, bust (60 kilograms), Hector will have a base offense level of 36 regardless of the amount of marihuana attributed to him.

[23] The PSR calculates the total based on the following estimates: (1) Between January and June 2001, 2275 kilograms of marihuana was stored at Garcia's house; (2) on June 13, 2001, 95 kilograms of marihuana was seized from Javier Cardenas's truck; (3) between June 14, 2001, and December 2001, eight loads of marihuana weighing 100 kilograms each (800 kilograms) were transported; (4) on October 4, 2001, 109 kilograms of marihuana was seized from a vehicle containing Ramirez's belongings; (5) on October 16, 2001, 107 kilograms of marihuana was seized from Garcia's home; (6) on December 2, 2001, Reyes was arrested with 111.7 kilograms; and (7) on October 14, 2002, 17.9 kilograms was seized from Michelle Diaz and Vanessa Ruiz.

[24] First, the quantity reported for the seizure on December 2, 2001, from Reyes's vehicle (111.7 kilograms), is lighter than the amount to which the witnesses testified, which was closer to 116 kilograms. Second, the government presented no evidence regarding a transaction on October 2002 (17.9 kilograms).

plus three), it appears that one load was double counted. But, the discrepancy from the double counting of a load (at most 111.7 kilograms) would not affect the base offense level, because the total marihuana would still exceed 3000 kilograms.[25] Moreover, the estimate adopted by the district court as to the quantity transported after the June bust was actually lighter than that supported by the evidence (because each load after the bust was reported to weigh as much as 200 kilograms).

With respect to the quantity of marihuana transported from January to June 2001, the finding that Cesar joined the conspiracy since its inception is not clearly erroneous.[26] Therefore, the marihuana transported during

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[25] U.S.S.G. § 2D1.1(3) (assigning a base offense level of 34 for at least 3,000, but less than 10,000, kilograms of marihuana).

[26] Garcia testified that, after the June 13 bust, "[w]e then approached Hector's brother Cesar, and we asked him if he wanted to start, you know, if we could start using his truck and we would just pay him what we were paying his brother." This testimony could be interpreted as suggesting that Cesar was not previously involved in the conspiracy. Ramirez's testimony is likewise uncertain as to Cesar's involvement in the conspiracy before the June 13 bust. Ramirez testified that, after the bust, Cesar "took over" his brother's role. When the prosecutor asked Ramirez whether Cesar was involved in the conspiracy before June 13, Ramirez responded that Cesar "was getting his own thing, too. . . . He was just getting loads of marihuana, too."

When the prosecutor asked Ramirez whether he delivered any loads to Cesar before the June 13 bust, he testified that "we dropped about 20 pounds, 15 pounds" on the way to Dallas. Although the testimony is less than pellucid, the district court, hearing the evidence firsthand, could have rationally interpreted this testimony to mean that Cesar was involved in a more minimal role before June 13 but became a leader after that. Specifically, the testimony could mean that Cesar was receiving loads of marihuana on occasion from the other conspirators before the bust but did not begin recruiting drivers and participating in the organization of the scheme until after the bust.

that period is attributable to Cesar, who also challenges the reliability of the estimate for this time frame because of the inconsistency among the witnesses' estimations, and between those estimations and the marihuana actually seized.[27]

Thus, the question is whether the PSR's estimation that 2275 kilograms was transported from January to June 2001 has an adequate evidentiary basis with sufficient indicia of reliability. *United States v. Alford*, 142 F.3d 825, 832 (5th Cir. 1998). A "district court may consider 'estimates of the quantity of drugs for sentencing purposes.'" *Id.* The court may extrapolate the quantity from "any information that has 'sufficient indicia of reliability to support its probable accuracy,' including a probation officer's testimony, a policeman's approximation of unrecovered drugs, and even hearsay." *Id.* (quoting *United States v. Huskey*, 137 F.3d 283, 291 (5th Cir. 1998) (citing U.S.S.G. § 6A1.3 cmt.)).

Although the witnesses' estimations of the quantity of marihuana per load are somewhat inconsistent and are not supported by the amount of drugs seized, the information in the PSR bore a sufficient indicia of reliability for the district court to rely on it. The PSR's estimate of 2275 kilograms seems to be based on ten loads of marihuana at

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[27] Ramirez testified that, between January and June 2001, ten loads of marihuana were transported, each between 400 and 500 pounds (roughly 180 to 227 kilograms). Garcia testified that each of the ten loads was between 500 and 1000 pounds (roughly 227 to 450 kilograms). The load seized on June 13, 2001, contained a much lower quantity of marihuana – 210 pounds (roughly 95 kilograms), but it also contained 132 pounds of cocaine (roughly 60 kilograms) concealed within the marihuana; so the total weight of the seizure was 342 pounds (or 155 kilograms).

roughly 227 kilograms a load (or 500 pounds), which would be consistent with Ramirez's and Garcia's testimony (at the high end of Ramirez's and the low end of Garcia's estimates).

VI.

Defendants contend the district court committed reversible *Booker* error. They concede that neither of them made a constitution-based objection at sentencing, and a review of the record further reveals that they objected solely to the factual findings in the PSR and not to the fact that the court was making factual findings. Thus, we review for plain error. *United States v. Mares*, 402 F.3d 511, 520 (5th Cir.), *cert. denied*, 126 S. Ct. 43 (2005).

"An appellate court may not correct an error the defendant failed to raise in the district court unless there is '(1) error, (2) that is plain, and (3) that affects substantial rights.'" *Id.* (quoting *United States v. Cotton*, 535 U.S. 625, 631 (2002)). If these conditions are met, the "court may then exercise its discretion to notice a forfeited error but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* Because these sentences were enhanced based on judge-found facts that were not admitted by the defendants or found by the jury, there is error that is plain. *Id.* at 521.

As in *Mares*, however, there is no showing that the error affected substantial rights. Defendants have the burden of showing that the district judge, "sentencing under an advisory scheme rather than a mandatory one, would have reached a significantly different result," *id.*, and they have not met this burden. The court made no affirmative statements at sentencing that indicate that it

would have reached a significantly different result under an advisory scheme.

In fact, the court commented, after defendants' pleas for mercy, that "I hear you both asking for mercy because basically this is the rest of your life in prison. . . . [N]obody has asked mercy for those people that got hooked on the drugs that you were moving so that you could make a living, so that you could live in a nice house and you could drive a nice car. What about those folks? Anybody want to ask mercy for them?" In these circumstances, defendants have not met the standard set forth in *Mares*. Although they urge us to discard *Mares* and use the plain error standard for *Booker* error adopted by other circuits, this panel is bound by *Mares*.

The judgments of conviction are AFFIRMED. The sentence of Hector Valdez is AFFIRMED. The sentence of Cesar Valdez is VACATED and REMANDED for resentencing.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-50499

D.C. Docket No. 2:03-CR-108-3-AML

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

CESAR ARRNOLDO VALDEZ

Defendant-Appellant

Appeal from the United States District Court for the Western District of Texas, Del Rio.

Before SMITH, GARZA, and OWEN, Circuit Judged.

JUDGMENT

(Filed June 15, 2006)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed in part and vacated in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

ISSUED AS MANDATE: JUL 7 2006

A True Copy
Attest

Clerk, U.S. Court of Appeals,
Fifth Circuit

By: /s/ [Illegible]
Deputy

New Orleans, Louisiana

UNITED STATES DISTRICT COURT
Western District of Texas
DEL RIO DIVISION

UNITED STATES OF AMERICA

v.

HECTOR RAUL VALDEZ

Defendant.

Case Number
DR-03-CR-108 (02) AML
USM Number 31399-180

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

(Filed Apr. 21, 2004)

The defendant, HECTOR RAUL VALDEZ, was represented by Gregory D. Torres.

The defendant has been found not guilty on Count(s) Seven and Eight of the 1st Superseding Indictment and is discharged as to such Count(s).

The defendant was found guilty on Count(s) One and Two of the 1st Superseding Indictment by a jury verdict on October 24, 2003 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such Count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. §§ 841(a)(1) & (b)(1)(A) and 846	Conspiracy to Possess Marijuana with Intent to Distribute	Beginning on or about January 1, 2001 and continuing until on or about October 14, 2002	One

21 U.S.C. § 841(a)(1) & (b)(1)(C) and 18 U.S.C. § 2	Possession of Marijuana with Intent to Distribute – Aiding and Abetting	Beginning on or about June 11, 2001 and continuing until on or about June 13, 2001	Two

As pronounced on April 19, 2004, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00 on each of Counts One and Two for a total of $200.00. Payment of the special assessment shall begin immediately. Said special assessment shall be made to the Clerk, U.S. District Court, 111 East Broadway, Room L-100, Del Rio, Texas 78840.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this the 21st day of April, 2004.

/s/ Alia Moses Ludlum
ALIA MOSES LUDLUM
United States District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of THREE HUNDRED SIXTY (360) MONTHS on Count One and TWO HUNDRED FORTY (240) MONTHS on Count Two to be served concurrently, with credit for time already served since February 5, 2003.

The Court makes the following recommendations to the Bureau of Prisons:

That the defendant be incarcerated in the federal facility at Three Rivers or as close to Del Rio, Texas as possible.

That the defendant participate in the Bureau of Prisons' Inmate Financial Responsibility Program.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By /s/ _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS on Count One and THREE (3) YEARS on Count Two, to run concurrently.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this Court as set forth on page 4 of this judgment; and shall comply with the following additional conditions:

X The defendant shall pay any fine that is imposed by this judgment and that remains unpaid at the commencement of the term of supervised release. Any balance at the commencement of the term of supervised release shall be paid in equal monthly installments of $450.00 commencing on the third day of each month, with the first payment due no later than 60 days after release from the Bureau of Prisons.

X The defendant shall submit to a drug test whenever ordered by the Probation Officer.

X The defendant shall abstain from the use of alcohol and/or all other intoxicants during the term of supervision.

X The defendant shall not incur new credit charges or open additional lines of credit without approval of the Probation Officer unless the defendant is in compliance with the payment schedule.

X The defendant shall provide the Probation Officer access to any requested financial information.

CONDITIONS OF SUPERVISION

Mandatory Conditions:

1) The defendant shall not commit another federal, states, or local crime.

2) The defendant shall not illegally possess a controlled substance.

3) If the judgment imposed a fine or a restitution obligation, it shall be a condition of supervision that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervision in accordance with any schedule of payments set forth in the Criminal Monetary Penalties sheet of the judgment. In any case, the defendant shall cooperate with the Probation Officer in meeting any financial obligations.

4) In supervised release cases only, the defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

5) If convicted of a felony, the defendant shall not posses a firearm, destructive device or any other dangerous weapon.

6) For offenses committed on or after September 13, 1994, the defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment or placement on probation and at least two periodic drug tests thereafter, as directed by the Probation Officer.

The above drug testing condition may be suspended based on the Court's determination that the defendant poses a low risk of future substance abuse.

Standard Conditions:

1) The defendant shall not leave the judicial district without the permission of the Court or Probation Officer.

2) The defendant shall report to the Probation Officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the Probation Officer and follow the instructions of the Probation Officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the Probation Officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the Probation Officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substance, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the Probation Officer.

10) The defendant shall permit a Probation Officer to visit him or her at any time at home or elsewhere

and shall permit confiscation of any contraband observed in plain view by the Probation Officer.

11) The defendant shall notify the Probation Officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.

13) As directed by the Probation Officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the Probation Officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $25,000.

This amount is the total of the fines imposed on individual counts, as follows:

Count One: $12,500

Count Two: $12,500

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

The defendant shall pay interest on any fine of more than $2,500.00, unless the fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All payment options may be subject to

penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

DENIAL OF FEDERAL BENEFITS
(For Offenses Committed
On or After November 18, 1988)

FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 862

IT IS ORDERED that the defendant shall be ineligible for all federal benefits, pursuant to 21 U.S.C. § 862 and/or 862(a).

UNITED STATES DISTRICT COURT
Western District of Texas
DEL RIO DIVISION

UNITED STATES OF AMERICA

v.

CESAR ARNOLD VALDEZ

Defendant.

Case Number
DR-03-CR-108 (03) AML
USM Number 74609-080

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

(Filed Apr. 21, 2004)

The defendant, CESAR ARNOLD VALDEZ, was represented by Jaime Efrain Cavazos.

The defendant has been found not guilty on Count(s) Six of the 1st Superseding Indictment and is discharged as to such Count(s).

The defendant was found guilty on Count(s) One, Four and Five of the 1st Superseding Indictment by a jury verdict on October 24, 2003 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such Count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. §§ 841(a)(1) & (b)(1)(A) and 846	Conspiracy to Possess Marijuana with Intent to Distribute	Beginning on or about January 1, 2001 and continuing until on or about October 14, 2002	One

21 U.S.C. § 841(b)(1) & (b)(1)(B) and 18 U.S.C. § 2	Possession of Marijuana with Intent to Distribute – Aiding and Abetting	October 16, 2001	Four
21 U.S.C. § 841(a)(1) & (b)(1)(B) and 18 U.S.C. § 2	Possession of Marijuana with Intent to Distribute – Aiding & Abetting	December 2, 2001	Five

As pronounced on April 19, 2004, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00 on each of Counts One, Four, and Five for a total of $300.00. Payment of the special assessment shall begin immediately. Said special assessment shall be made to the Clerk, U.S. District Court, 111 East Broadway, Room L-100, Del Rio, Texas 78840.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this the 21st day of April, 2004.

/s/ Alia Moses Ludlum
ALIA MOSES LUDLUM
United States District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of THREE HUNDRED SIXTY (360) MONTHS on each of Counts One, Four and Five to be served concurrently with credit for time already served since June 3, 2003.

The Court makes the following recommendations to the Bureau of Prisons:

That the defendant be incarcerated in a federal facility at close to Del Rio, Texas as possible.

That the defendant participate in the Bureau of Prisons' Inmate Financial Responsibility Program.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

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_____

Defendant delivered on _____ to _____
at _____ , with a certified copy of this Judgment.

_____
United States Marshal

By /s/ _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS on each of Counts One, Four, and Five, to be run concurrently.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this Court as set forth on page 4 of this judgment; and shall comply with the following additional conditions:

X The defendant shall pay any fine that is imposed by this judgment and that remains unpaid at the commencement of the term of supervised release. Any balance at the commencement of the term of supervised release shall be paid in equal monthly installments of $450.00 commencing on the third day of each month, with the first payment due no later than 60 days after release from the Bureau of Prisons.

X The defendant shall submit to a drug test whenever ordered by the Probation Officer.

X The defendant shall abstain from the use of alcohol and/or all other intoxicants during the term of supervision.

X The defendant shall not incur new credit charges or open additional lines of credit without approval of the Probation Officer unless the defendant is in compliance with the payment schedule.

X The defendant shall provide the Probation Officer access to any requested financial information.

X The defendant shall make a diligent effort to satisfy any fine, restitution order, Court costs or assessment, and/or Court ordered child support or alimony payments that have been or may be imposed and shall provide such financial information as may be requested by the United States Probation Office relevant to payment of the obligation. If unable to pay the obligation in one sum, the defendant will cooperate with the Probation Officer in establishing an installment payment schedule.

CONDITIONS OF SUPERVISION

Mandatory Conditions:

1) The defendant shall not commit another federal, states, or local crime.

2) The defendant shall not illegally possess a controlled substance.

3) If the judgment imposed a fine or a restitution obligation, it shall be a condition of supervision that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervision in accordance with any schedule of payments set forth in the Criminal Monetary Penalties sheet of the judgment. In any case, the defendant shall cooperate with the Probation Officer in meeting any financial obligations.

4) In supervised release cases only, the defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

5) If convicted of a felony, the defendant shall not posses a firearm, destructive device or any other dangerous weapon.

6) For offenses committed on or after September 13, 1994, the defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment or placement on probation and at least two periodic drug tests thereafter, as directed by the Probation Officer.

The above drug testing condition may be suspended based on the Court's determination that the defendant poses a low risk of future substance abuse.

Standard Conditions:

1) The defendant shall not leave the judicial district without the permission of the Court or Probation Officer.

2) The defendant shall report to the Probation Officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the Probation Officer and follow the instructions of the Probation Officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the Probation Officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the Probation Officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substance, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the Probation Officer.

10) The defendant shall permit a Probation Officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the Probation Officer.

11) The defendant shall notify the Probation Officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.

13) As directed by the Probation Officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the Probation Officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $25,000.

This amount is the total of the fines imposed on individual counts, as follows:

Count One: $8,333.33

Count Four: $8,333.33

Count Five: $8,333.34

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

The defendant shall pay interest on any fine of more than $2,500.00, unless the fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

DENIAL OF FEDERAL BENEFITS
(For Offenses Committed
On or After November 18, 1988)

FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 862

IT IS ORDERED that the defendant shall be ineligible for all federal benefits, pursuant to 21 U.S.C. § 862 and/or 862(a).